

ORIGINAL

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

James Craid Bird — PETITIONER
(Your Name)

vs.

State of Colorado — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Colorado Supreme Court Order, denying certiorari, dated 08/20/2018
Colorado Court of Appeals, Announced March 15, 2018 (unpublished)

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

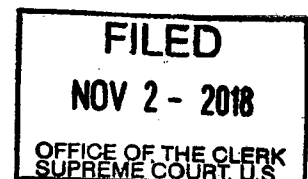
PETITION FOR WRIT OF CERTIORARI

James Craig Bird
(Your Name)

Fremont Correctional Facility (FCF) Box 999
(Address)

Canon City, CO 81215
(City, State, Zip Code)

N/A
(Phone Number)



QUESTION(S) PRESENTED

- I. Whether the State improperly determined the prejudice prong underlying the test set-forth in *Strickland v. Washington*, 466 U.S. 668 (1984) as to erroneous advice with respect to the parole eligibility date, which was a deprivation of the opportunity to make a reasonably informed decision on whether to accept the People's plea offer.
- II. Whether the State improperly interpreted and construed this Court's holding in *Hill v. Lockhart*, 474 U.S. 52 (1985), with respect to the showing that but for counsel's deficient performance, a plea of not guilty would have been entered and the insistence that trial be held.

ORIGINAL

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☐ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☒ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the Colorado Court of Appeals court appears at Appendix B to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☒ For cases from **state courts**:

The date on which the highest state court decided my case was 08/20/2018.
A copy of that decision appears at Appendix A.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

ORIGINAL

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

Amendment VI

STATEMENT OF THE CASE

Petitioner contends, principally, that the state trial court and court of appeals erroneously held that the prejudice prong set-forth under this Court's established law concerning ineffective assistance of counsel claims in *Strickland v. Washington*, 466 U.S. 668 (1984); that it did so absent a careful reading of another established law pronounced by this Court a year later in *Hill v. Lockhart*, 474 U.S. 52 (1985); holding that "when a defendant accepts a plea agreement based on incorrect legal advice, that plea could be withdrawn as counsel was ineffective." *Id.* at 56.

Nevertheless, following an evidentiary hearing conducted pursuant to the state's procedural and statutory right to petition the court for post-conviction review, in which the Petitioner asserted that plea counsel provided ineffective assistance of counsel that prejudiced him when erroneous advice was given regarding a plea offer of 8 to 24 year sentence, and that his parole eligibility date would be after serving 37 percent or approximately 6 years, which deprived him of an opportunity to make a reasonably informed decision on whether to accept the State's plea offer.

At the hearing, Petitioner took the stand and testified that plea counsel first met him to discuss the plea offer, in which he would plead guilty to one count without any sentencing concessions, and the remaining counts would be dismissed. Petitioner thought the 8 to 24 years to life was a horrible deal because it ensured life in prison. However, in an effort to convince Petitioner to accept the plea offer, plea counsel stated that he would be eligible for parole after only serving 37 percent of his sentence. Plea counsel also informed Petitioner that he would receive a minimum sentence at best, and a midpoint sentence at worst. This persuaded Petitioner to accept the plea offer. In addition to Petitioner's statements, he clarified that had plea counsel properly informed him that he would have to first serve the entire amount, less any earned time, before being eligible, and that under this sentencing scheme is the likelihood that he would serve a natural life sentence, he would never have accepted it.

Again, plea counsel assured Petitioner that 37 percent of the sentence would first be served before becoming eligible for release onto parole, where petitioner ultimately entered a plea of guilty in which he received a 24 to life sentence.

Following a lengthy determination whereupon an expert testified as to the objective standard of reasonableness plea counsel provided, as constituting "clear incompetence," the opinion was that the deficient performance prong in *Strickland* had been met. However, there was a dispute as to whether the Petitioner had been prejudiced with respect to plea counsel preventing him from entering a knowing and voluntary plea, thus meeting the prejudice prong in *Strickland*.

The district court concluded that plea counsel's assistance was in fact deficient because they failed to compare Time Comp's answer against the applicable statutes; reasoning, "[h]ad they done so, they would have realized the error and/or confusion.....[K]nowing the importance of [Petitioner's parole eligibility date], given the plain language of the statute (C.R.S. § 17-22.5-405), reasonably effective assistance required plea counsel to conduct appropriate research, compare that research to Time Comp's answer, and accurately advise Defendant of the [PED] answer and/or uncertainty of that answer. However, the court concluded that Petitioner did not suffer prejudice as a result of plea counsel's deficient performance because, even though Petitioner testified that he did not know that his parole eligibility was closer to 70%, it found such testimony incredible.

Despite this conclusion, however factually erroneous or unsound the Petitioner may contend, it flies in the face of this Court's clearly established precedent set-forth in *Hill v. Lockhart*, and thus this Court is better suited than the state court's below to address the application thereof, and its concomitant impact, as having subjugated his Sixth Amendment Right to the Effective Assistance of Counsel. Hence the foregoing Petition.

The indeterminate-life sentence that Petitioner is currently serving under is effectively a life sentence, notwithstanding he is in his late sixties, and that the parole board retains absolute discretion whether to release him onto parole. See Colo. Rev. Stat. § 18-1.3-1004(1)(a).

Given the gravity of this life sentence of which counsel failed to properly advise him of, further corroborates Petitioner's testimony that had he even known this, he would never have entered into a plea offer of what could very likely amount to a life sentence.

REASONS FOR GRANTING THE PETITION

The district court violated Petitioner's constitutional right to effective assistance of counsel when it erroneously found that he was not entitled to post-conviction relief because (1) plea counsel provided representation that fell below an objective standard of reasonableness when they erroneously advised him that he would be parole eligible after serving 37% of his sentence (2) reliance on counsel's representations regarding his parole eligibility date (3) counsel's representations regarding his parole eligibility date persuaded Petitioner to accept the prosecution's plea offer (4) numerous objective factors, and Petitioner's own testimony, demonstrated that Petitioner would not have accepted the plea offer and would have proceeded to trial but for counsel's erroneous advice regarding his parole eligibility date.

By holding otherwise, the State has impermissibly constitutionalized the ratio decidendi this Court reached in *Hill v. Lockhart*, of which, in essence, should offend the principles that this Court is ever watchful of, and the fact that the State failed to interpret this Court's clearly established precedent is indication enough that the extraordinary review this Court may bestow, must be effectuated here as a reason to grant certiorari to compel the State to follow the Supreme Law of the Land. And in the words of the inestimable jurist, William O. Douglas, the "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance...." *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965). While this may not be a privity issue in as much as it confers such a protection, the issue does imply providence worthy of trust and comity between a professional, whose apparent negligence has arrogated responsibility and conduct that warrants review here.

It is worth pointing out that the federal judiciary would have likely granted Petitioner relief. See, e.g., *U.S. v. Ortiz-Garcia*, 665 F.3d 279, 284-85 (1st Cir. 2011) (plea not knowing because defendant not informed of possible sentence); *Julian v. Bartley*, 495 F.3d 487, 500 (7th Cir. 2007) (performance deficient because counsel advised defendant maximum sentence was half of actual sentence, and prejudiced because counsel told him he faced 30 years when he faced 60, causing him to accept the guilty plea he would have otherwise rejected.)

Because the record unequivocally demonstrates that Petitioner's plea counsel provided ineffective assistance of counsel that prejudiced him, the Petitioner respectfully requests that this Court hear this matter in full view of the fact that counsel's performance was so deficient as to cast serious doubt of the reliability of the proceedings below. That is, "because counsel's incorrect estimate of likely sentence based on ignorance of the law counsel should have known fell below objective standard of reasonable performance." U.S. v. Booze, 293 F.3d 516, 518 (D.C. Cir. 2002).

In light of the foregoing, it is clear that there was a reasonable probability that, but for counsel's errors (gross negligence), petitioner would not have pleaded guilty and would have insisted on going to trial.

After all, the Petitioner served his Country in Vietnam as a Navel Intelligence Officer, and is a professional aviator once approached by NASA...

CONCLUSION

May it please the Court, the above considered premises, and the prayer so help him <G>, may this writ of certiorari be granted.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

James Craig Bird 

Date: 10-23-18